IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

SECOND APPEAL NO. 389 OF 2004

Mr. Shivadas D. Bhinge. ... Appellant.

V/s.

Mr. Dattatray D. Khatavkar ... Respondent.

....

Mr. S.S. Patwardhan for the Appellant.
Mr. Machindra Patil for the Respondent.

CORAM : DR.D.Y. CHANDRACHUD J.

05TH JULY 2007.

P.C. :

. Admit.

2. The Second Appeal raises the following substantial question of law :

> Was the Appellate Court justified in setting aside the declaration and the decree for partition passed by the Trial Court when, even according to the Respondent, the Appellant is lawfully entitled to ownership and possession of 18 out of 45 plots in Gat No.100/1-B/2-A.

3. The Appeal has been taken up for hearing at this stage with the consent of the learned Counsel at their request.

4. The Appellant before the Court is the original Plaintiff in a suit seeking the relief of a declaration and partition, before the Civil Judge, Senior Division, Pandharpur. The parties are brothers-in-law. The land in question bears Gat No. 100/1-B/2-A admeasuring 5 acres and is situated at Village Pandharpur in the district of Solapur.

5. The case of the Appellant was that he and the Respondent had purchased the suit property on 28th March 1992 by contributing an equal amount towards the purchase price. According to the Appellant, the Respondent asserted that he had a 60% share in the suit property. Consequently, a suit for declaratory relief and seeking partition was instituted before the Trial Court on 24th April 1996.

6. The suit was decreed on 3rd October 2000. The learned Trial Judge entered the finding that the

Appellant had proved that he had jointly purchased the property with the Respondent and that he had a half share therein. The Collector was directed to enforce the partition in terms of the decree. The Respondent carried the matter in Appeal. The Additional District Judge, Pandharpur allowed the Appeal and set aside the decree for partition by a judgment dated 5th April 2003.

7. The Appellate Court has, in the course of the Judgment noted certain undisputed facts. These facts have also not been disputed before this Court. The Respondent had executed a Power of Attorney on 29th June 1992 in favour of the Appellant, authorising the Appellant to convert the land to non-agricultural use, and to get the lay out plan duly sanctioned. In pursuance of the Power of Attorney, the Appellant got the land converted to non-agricultural use and obtained a sanction for the lay out after carving 45 plots. The Appellant had submitted an application dated 13th January 1994 to the Revenue Authority to effect a mutation of the 45 plots; 27 of those plots in favour of the Respondent and 18 plots in favour of the Appellant. The application dated 13th January

1994 was marked as Exhibit 33 in evidence and was admitted in evidence with the consent of the Appellant herein. In fact, in the course of his cross-examination, the Appellant also admitted that he had made an application for mutation. The Appellate Court noted that the Appellant specifically admitted that after 45 plots were carved out and the lay out plan was sanctioned, the Appellant and the Respondent had each taken plots in accordance with the list annexed thereto and sought the preparation of Village Form No. 7-12, in accordance with the allotments which were mutually agreed upon by the parties. A mutation entry was thereafter made. The Appellant in fact acted upon the partition by selling some of the plots which had fallen to his share.

8. On this state of the record, the Appellate Court was justified in coming to the conclusion that the parties had by a mutual agreement between themselves arrived at a partition of the lands. In the course of the agreement, 45 plots were carved out. The Appellant himself moved the Revenue Authorities for mutating the lands so that 18 plots would fall to the share of the Appellant and 27 plots

would fall to the share of the Respondent. The Appellate Court recorded that it was not the case of the Appellant herein that the partition was as a result of fraud or a mistake. This part of the finding of the Appellate Court is un-exceptionable and does not warrant interference in the Second Appeal. The finding is based on the evidence and no substantial question of law arises in regard thereto.

9. Counsel appearing on behalf of the Appellant urged that the theory of the partition was not reflected in the pleading of the Respondent who is the original Defendant. That objection however, has no merit since a perusal of the written statement would show that such a plea was in fact raised by the Respondent in paragraph 3 of the written statement. The written statement has been produced before the Court and has been perused in the course of the hearing. A plea in fact was duly entered by the Respondent.

10. Counsel appearing on behalf of the Appellant has however urged that the Appellate Court has erred in setting aside the entire decree and that the

Appellant ought to have been granted a declaration together with a consequential decree for partition in so far as the 18 plots which fell to the share of the Appellant are concerned. The submission of the Appellant on this aspect of the matter is worthy of acceptance. This position is not in dispute before the Court nor is it contested in the oral submissions. The Second Appeal would therefore be required to be allowed to the limited extent that the Appellant would be entitled to a declaration that he is the owner of 18 plots of the 45 plots carved out of Gat No.100/1-B/2-A at Village Takali, Taluka Pandharpur as reflected in Exhibit 33 viz. the list appended to the application submitted by the Appellant on 13th January 1994 to the Revenue Authority.

11. The Appellant would be entitled to partition and separate possession of 18 plots which have fallen to his share. On this aspect of the matter, it must be recorded that Counsel appearing on behalf of the Respondent has also stated that there could be no objection. The Judgment and Order of the Appellate Court shall accordingly by consent stand modified to

the aforesaid extent.

12. The Second Appeal shall accordingly by consent stand allowed to the aforesaid extent. There shall be no order as to costs.